In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-131

JOSEPH NOCAR AND JOHN PENDERGAST, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners contend that (1) the failure of the Director of the Bureau of Narcotics and Dangerous Drugs to republish the schedules of "controlled substances", as required by 21 U.S.C. 812(a), precluded their prosecution for possession of marijuana; and (2) the court erred in denying their motion to suppress marijuana which had been seized in a warrantless search of an automobile.

After a jury-waived trial in the United States District Court for the Northern District of Illinois, petitioners were convicted of having possessed a quantity of marijuana with intent to distribute the same, in violation of 21 U.S.C. 841(a)(1). Petitioner Nocar was sentenced to a term of three years' imprisonment to be followed by a special three-year parole term; petitioner Pendergast was sentenced to a term of six months' imprisonment to be followed by four years' probation. The court of appeals affirmed (497 F. 2d 719; Pet. App. 1-13).

The evidence as summarized by the court of appeals (Pet. App. 3-5) showed that on January 7, 1972, federal customs agents received an informant's tip that three persons driving a blue Toyota with a specified Texas license number were at a named Chicago motel trying to find narcotics buyers. After verifying that the described car was at the motel, the agents established surveillance. A motor vehicle check showed that the Toyota recently had been in Mexico. The agents observed petitioner Pendergast arrive at the motel, enter the room, and converse with the three others. The agents subsequently followed the four persons to a garage. Later that day, after the four had left the garage, the agents returned with a search warrant, but found no contraband.

Surveillance of the garage was continued the next day. After Agent King saw petitioner Nocar remove some white plastic bags from the trunk and hand them to petitioner Pendergast, Agent Smith jumped from his car, and shouted "federal officers." One of the petitioners immediately closed the trunk. Agent Smith thereupon asked Nocar to open the trunk; Nocar shrugged his shoulders and did so.[1] Agent Smith observed white plastic bags and vegetable material in the trunk. He also detected a strong odor of marijuana. Petitioners were placed under arrest, and an immediate search of the garage revealed a substantial quantity of marijuana.

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[1]At a pretrial suppression hearing petitioners testified to a different version of events. For example, they denied hearing Smith shout "federal officers" and contended that Smith had demanded, rather than requested, that Nocar open the trunk. On the latter point the trial court held that the government had "failed to meet its burden of proof on its consent theory." Since the court of appeals held that the warrantless search was justified by probable cause and the necessity to prevent removal of the contraband, it stated no conclusion on the consent theory.

1. Petitioners contend that the alleged failure of the Director of the Bureau of Narcotics and Dangerous Drugs timely to republish and update the schedules of controlled substances as mandated by 21 U.S.C. 812(a) warrants the reversal of their convictions. Section 812(a) provides in part:

> * * * The schedules established by this section shall be updated and republished on a semiannual basis during the two year period beginning one year after the date of enactment of this subchapter and shall be updated and republished on an annual basis thereafter.

The subchapter was enacted on October 27, 1970. Marijuana was listed in schedule I of the statute. Petitioners contend that the statute made republication of the schedules mandatory on October 27, 1971. As the court below held, however, the statutory provision does not require republication on October 27, 1971. Rather, it directs that that date be used to determine when, during the following two years, the six-month demarcations were to fall. The first republication, therefore, was due April 27, 1972. Accordingly, in January 1972, when petitioners' offense occurred, there was a valid prohibition in force, regardless of what steps the government might have failed to take thereafter.

2. Petitioners also contend that the trial court erred in denying their motion to suppress, since the search allegedly was not grounded on probable cause. The foregoing evidence, however, presented at the hearing on the motion to suppress, clearly provided probable cause for the search. *Carroll* v. *United States,* 267 U.S. 132, 149. Moreover, the agents' failure to obtain a search warrant was justified by the need to prevent

removal and loss of the contraband. Although the garage was not far from the Federal Building, there was no magistrate available at the time to issue a search warrant. As the court below noted, much time might have been consumed in finding an available magistrate, during which time the automobile would have had to be seized and held. Under these circumstances, given probable cause to search, the immediate search without a warrant was permissible. *Chambers* v. *Maroney*, 399 U.S. 42, 52.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

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